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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

NO. [redacted] 47

SARAH ENELOW, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent (Appellee Below).

MEMORANDUM FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

NO. 1065.

SARAH ENELOW, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent (Appellee Below).

MEMORANDUM FOR RESPONDENT

The respondent does not oppose the granting of a writ of certiorari. The decisions below are, however, firmly believed to be correct.

The decisions below in this case are supported by the following precedents: *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235, 241, 242-243; *Phillips-Morefield v. Southern States Life Insurance Co.,* 66 Fed. (2d) 29, 30 (C. C. A. 5); *New York Life Insurance Co. v. Marotta,* 57 Fed. (2d) 1038 (C. C. A. 3); *New York Life Insurance Co. v. Hurt,* 35 Fed. (2d) 92 (C. C. A. 8), 41 Fed. (2d) 392; 51 Fed. (2d) 936 (C. C. A. 10), certiorari denied, 285 U. S. 541; *Peake v. Lincoln National Life Insurance Co.,* 15 Fed. (2d) 303, 305 (C. C. A. 8); *Union Pacific R. Co. v. Syas,* 246 Fed. 561, 566 (C. C. A. 8).

The petition for certiorari indicates that the Fifth Circuit is in conflict with the Third Circuit. A decision by the Circuit Court of Appeals for the Fifth Circuit on all fours with the case at bar is in accord with the decisions below: *Phillips-Morefield v. Southern States Life Insurance Co.,* 66 Fed. (2d) 29, 30.

The petitioner has not been deprived unlawfully of a jury trial. In the words of Judge Foster in *Phillips-Morefield v. Southern States Life Insurance Co., supra* (p. 30):

> "The principal contention of appellant is that the equitable plea was improperly allowed, on the ground that the defenses set up therein could have been urged at law. Therefore the insurance company had an adequate remedy at law, and, by maintaining the plea, she was deprived of a trial by jury. In support of this appellant relies upon the cases of *N. Y. Life Ins. Co. v. Marshall,* 23 F. (2d) 225, decided by this court, and *Phoenix Mutual Life Ins. Co. v. Bailey,* 13 Wall. 616, 20 L. Ed. 501. Those cases may be easily distinguished. In each case it appeared that a separate bill in equity had been filed for the cancellation of a life insurance policy, and there was an action at law pending on the policy. It was held that the grounds for cancellation of the policies alleged in the bills could be urged in defense in the pending suits at law. The bills were dismissed on the ground that the insurance companies had an adequate remedy at law. The situation is different when an equitable defense is interposed in an action at law, under the provisions of the Act of March 3, 1915, adding section 274b to the Judicial Code (28 U. S. C. A. §398). In the leading case of *Liberty Oil Co. v. Condon National Bank,* 260 U. S. 235, 43 S. Ct. 118, 67 L.

Ed. 232, it was pointed out by the Supreme Court that the statute brought about a consolidation of law and equity in one action in the federal courts, similar to the practice under various state codes, without at all changing the principles applicable to an action at law or in equity. And it was held that the equitable issues raised should be first disposed of as in a court of equity, and then, if an issue at law remained, it was triable to a jury; therefore the right of trial by jury guaranteed by the Seventh Amendment was not infringed."

Phoenix Mutual Life Insurance Co. v. Bailey, 13 Wall. 616; *Cable v. United States Life Insurance Co.,* 191 U. S. 288; *Buzard v. Houston,* 119 U. S. 347; and *Hipp v. Babin,* 19 How. 271, cited by the petitioner, were all decided before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. None of those cases has anything to do with the manner in which an equitable issue introduced into an action at law under Section 274(b) of the Judicial Code should be disposed of. Those were all cases involving separate suits in equity. *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, also involved a separate suit in equity. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law, that is beside the question here presented, which is how an equitable defense specifically authorized by a new provision added to the Judicial Code should be adjudicated. The answer to the question presented is contained in the cases first cited in this memorandum.

The defense that the contract sued upon was induced by fraud is an equitable defense. The group of

cases first cited in this memorandum is authority for that conclusion. To those might be added *Fay v. Hill,* 249 Fed. 415, 418 (C. C. A. 8). Fraud is one of the best recognized branches of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; *1 Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

In *Susquehanna S. S. Co. v. Andersen & Co.,* 239 N. Y. 285, cited by the petitioner, the defense that the written instrument sued upon failed by a mistake to express the real intention of the parties was held to constitute an equitable defense. In *Ford v. Huff,* 296 Fed. 652, *laches* was held to be an equitable defense. There is nothing inconsistent with the decisions below in the other case cited by the petitioner in this connection: *Petrogradsky M. K. Bank v. National City Bank,* 253 N. Y. 23.

There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief. *2 Pomeroy's Equity Jurisprudence* (4 Ed.) § 885; *Smith v. Richards,* 13 Pet. 26, 36; *Turner v. Ward,* 154 U. S. 618; *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2); *Taylor v. Burr Printing Co.,* 26 Fed. (2d) 331, 334 (C. C. A. 2); *New York Life Insurance Co. v. Marotta,* 57 Fed. (2d) 1038 (C. C. A. 3); *Halsey v. Minnesota-South Carolina L. & T. Co.,* 28 Fed. (2d) 720, 723 (C. C. A. 4); *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6);

Herschberger v. Woodrow-Parker Co., 275 Fed. 908, 916 (C. C. A. 6); *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7); *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8). Sooner or later, therefore, the respondent would have the right to have its defense of fraud adjudicated according to the equitable rule for determining whether a contract has been procured by fraud. Efficiency, economy and enlightened practice, as well as all other sound considerations, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank et al., supra,* 260 U. S. 235, 242. The inadequacy of the remedy at law need not be specifically averred in the defendant's pleadings, inasmuch as it follows from the application of the relevant legal principles to the facts of the case and is therefore a conclusion which the courts perceive.

The petitioner is not the only person having an interest in the policy sued on, as stated in her brief. If the policy of insurance, which is the subject of the litigation, was procured by fraud, the premiums paid by the decedent would be legally refundable to his estate, and not to the beneficiary, the petitioner. The executors of Max Enelow's estate are Anna Katz and Myer Enelow. These persons are not parties to the present suit. That the petitioner is not the only person with an interest in the subject matter of this litigation follows as a matter of law and therefore that legal conclusion need not be pleaded.

The remedy at law must be in all respects equal to that in equity in order to oust the latter of jurisdiction: *Boyce v. Grundy,* 3 Pet. 210, 215. Here, for the reasons shown above, it is not so.

That the constitutional guaranty of trial by jury does not apply to equity procedure is well established: *Parsons v. Bedford et al.,* 3 Pet. 433, 446; *Barton v. Barbour,* 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

The case of *Banker v. Ford Motor Co.,* referred to in the opinion of the Circuit Court of Appeals (R. 49), has now been reported in 69 Fed. (2d) 665.

For the reasons outlined above, the decisions below in this case are correct.

Respectfully submitted,

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